

IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE DIVISION  
3:09-cr-134

## ORDER

**THIS MATTER** is before the Court on remand from the United States Court of Appeals for the Fourth Circuit for further proceedings. (Doc. No. 49: Opinion and Judgment).

The government filed a brief addressing the issues on remand as directed (Doc. No. 52), but the defendant did not. The government now takes the position that the Court should apply the mandatory minimum punishment lowered by the Fair Sentencing Act of 2010 (FSA), although the defendant committed his offense before the effective date of the Act. (Id. 4). As detailed by the government, there is no controlling authority in the Fourth Circuit and other circuit courts have reached divergent conclusions about whether the new mandatory minimum sentences apply to old offenses. See e.g. United States v. Dixon, 648 F.3d 195, 203 (3d Cir. 2011) (FSA applies to sentences imposed on or after August 3, 2010); United States v. Douglas, 644 F.3d 39, 42-44 (1st Cir. 2011) (FSA applies to sentences imposed on or after November 1, 2010); United States v. Sidney, 648 F.3d 904, 910 (8th Cir. 2011) (FSA does not apply retroactively to offenses committed before its enactment); United States v. Fisher, 635 F.3d 336, 340 (7th Cir. 2011) (same).

The Court has considered the government's revised position on retroactivity and the developments in the case law in other jurisdictions and continues to find that the federal savings

statute, 1 U.S.C. § 109, operates to bar retroactive application of the FSA's statutory penalties to offenses committed prior to its enactment, absent congressional indication to the contrary. The Court further continues to find, for the reasons stated at the sentencing hearing, that a sixty-month sentence is necessary to accomplish the sentencing objectives of 18 U.S.C. § 3553(a) if no mandatory minimum is applicable.

**IT IS, THEREFORE, ORDERED**, that the Clerk of Court prepare a judgment imposing a sixty-month sentence of imprisonment along with the other terms previously imposed except the requirement that the defendant repay a portion of his court-appointed attorney's fees.

The Clerk is directed to certify copies of this order to the defendant, counsel for the defendant, to the United States Attorney, and the Clerk of the United States Court of Appeals for the Fourth Circuit.

Signed: May 18, 2012

  
\_\_\_\_\_  
Robert J. Conrad, Jr.  
Chief United States District Judge

